

## UIIdaho Law Digital Commons @ UIIdaho Law

---

Not Reported

Idaho Supreme Court Records & Briefs

---

10-15-2014

# Peterson v. State Appellant's Brief Dckt. 42001

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"Peterson v. State Appellant's Brief Dckt. 42001" (2014). *Not Reported*. 1880.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/1880](https://digitalcommons.law.uidaho.edu/not_reported/1880)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS PETERSON,	)	
	)	NO. 42001
Petitioner-Appellant,	)	
	)	ADA COUNTY NO. CCV 2014-1288
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
_____	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

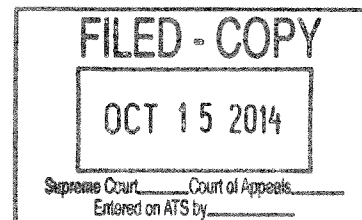
HONORABLE MICHAEL E. WETHERELL  
District Judge

SARA B. THOMAS  
State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

ERIK R. LEHTINEN  
Chief, Appellate Unit  
I.S.B. #6247

BRIAN R. DICKSON  
Deputy State Appellate Public Defender  
I.S.B. #8701  
3050 N. Lake Harbor Lane, Suite 100  
Boise, ID 83703  
(208) 334-2712

KENNETH K. JORGENSEN  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534



ATTORNEYS FOR  
PETITIONER-APPELLANT

ATTORNEY FOR  
RESPONDENT

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
Nature of the Case .....	1
Statement of the Facts and Course of Proceedings.....	1
ISSUES PRESENTED ON APPEAL.....	7
ARGUMENT.....	8
I. The District Court Erroneously Summarily Dismissed Mr. Peterson's Successive Petition Without Providing Him Notice Of The Reason For Dismissal And Providing Him A Meaningful Opportunity To Respond Thereto.....	8
II. The District Court Erred By Summarily Dismissing Mr. Peterson's Petition Without First Resolving The Question Of Whether Counsel Should Be Appointed And When His Allegations Established the Possibility Of A Valid Claim.....	11
CONCLUSION .....	16
CERTIFICATE OF MAILING .....	17

## TABLE OF AUTHORITIES

### Cases

<i>Baker v. State</i> , 142 Idaho 411 (Ct. App. 2005) .....	9
<i>Baldwin v. State</i> , 145 Idaho 148 (2008) .....	8
<i>Baxter v. State</i> , 149 Idaho 859 (Ct. App. 2010) .....	11
<i>Booth v. State</i> , 151 Idaho 612 (2011) .....	13
<i>Brown v. State</i> , 135 Idaho 676 (2001).....	8, 12
<i>Carl H. Christensen Family Trust v. Christensen</i> , 133 Idaho 866 (1999) .....	12
<i>Charboneau v. State</i> , 140 Idaho 789 (2004) .....	12, 13
<i>DeRushe v. State</i> , 146 Idaho 599 (2009).....	8
<i>Griffin v. State</i> , 142 Idaho 438 (Ct. App. 2006) .....	9
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985) .....	13
<i>Judd v. State</i> , 148 Idaho 22 (Ct. App. 2009) .....	13
<i>Loveland v. State</i> , 141 Idaho 933 (Ct. App. 2005) .....	8
<i>Mata v. State</i> , 124 Idaho 588 (Ct. App. 1993).....	8
<i>McKay v. State</i> , 148 Idaho 567 (2010).....	13
<i>McKeeth v. State</i> , 140 Idaho 847 (2004).....	13
<i>Mitchell v. State</i> , 132 Idaho 274 (1998).....	14
<i>Murphy v. State</i> , 143 Idaho 139 (Ct. App. 2006).....	14
<i>Rhoades v. State</i> , 148 Idaho 247 (2009) .....	8
<i>Ridgley v. State</i> , 148 Idaho 671 (2010).....	8, 9, 11, 13
<i>Saykhamchone v. State</i> , 127 Idaho 319 (1995).....	9, 10, 11

*State v. Peterson*, 2013 Unpublished Opinion No. 408 (Ct. App. Mar. 19, 2013).1,

2

*Strickland v. Washington*, 466 U.S. 668 (1984) .....13

#### Statutes

I.C. § 19-4901 .....10

I.C. § 19-4906 .....8, 10

I.C. § 19-4908 .....10

#### Rules

I.C.R. 35.....2

## STATEMENT OF THE CASE

### Nature of the Case

Thomas Peterson appeals, contending that the district court erred when it summarily dismissed his successive petition for post conviction relief without providing him prior notice of the grounds upon which that dismissal was based – that Mr. Peterson’s claims of relief for ineffective assistance of counsel were procedurally defaulted because he did not raise them in his initial petition. He also contends that the district court erred by failing to address his renewed request for counsel, since his allegations established at least the possibility of a valid claim that trial counsel had provided ineffective assistance. As such, this Court should vacate the judgment and remand this case for further proceedings.

### Statement of the Facts and Course of Proceedings

In the underlying criminal case (the second case), Mr. Peterson pled guilty to one count of violating a no contact order. (R., p.35.)<sup>1</sup> He was sentenced to a unified term of five years, with three and one-half years fixed. (R., p.35.) That sentence was ordered to run concurrently with a sentence for a previous violation of that same no contact order (the first case). *State v. Peterson*, 2013 Unpublished Opinion No. 408, \*2 (Ct. App. Mar. 19, 2013) (the opinion from Mr. Peterson’s subsequent appeal in those cases, as well as a subsequent case). Mr. Peterson’s probation was revoked after he was bound over and pled guilty to a new charge of violating that same no contact order

---

<sup>1</sup> In reciting the factual history of this case, it appears that the district court implicitly took judicial notice of the record in the underlying criminal case. (See R., pp.35-36.) A motion for this Court to take judicial notice of the documents in its file from the direct appeal in that case has been filed concurrently with this brief.

(the third case), since that violation was also alleged as a probation violation in the first two cases. *Id.* Mr. Peterson filed a motion for leniency pursuant to I.C.R. 35 (*hereinafter*, Rule 35) in the third case, which the district court denied. (R., pp.35-36.) He then filed notices of appeal from the orders revoking his probation in the first two cases and from the order denying his Rule 35 motion in the third case. *State v. Peterson*, 2013 Unpublished Opinion No. 408, \*3 (Ct. App. Mar. 19, 2013). Those appeals were consolidated. *Id.*

One of the claims in that appeal was that Mr. Peterson had been deprived of an adequate record on appeal because an exhibit which the State had submitted during the preliminary hearing in the third case (which he asserted consisted of documentation of various telephone and text communication records) had been lost by the district court. *Id.* at pp.3-5. The Court of Appeals ultimately concluded that the district court had not actually considered the documents in question, and therefore, their absence from the appellate record did not prejudice his direct appeal. *Id.* at p.5. The Court of Appeals also affirmed the district court's decisions to impose and execute Mr. Peterson's sentences. *Id.* at \*7.

While the direct appeals were pending, Mr. Peterson filed a petition for post conviction relief in the underlying criminal case, in which he challenged his trial attorney's competence with respect to the plea agreement and negotiations, and also challenged his sentence as being excessive. (R., p.36.) The district court summarily dismissed that petition. (R., p.36.)

Thereafter, Mr. Peterson filed a successive petition for post conviction relief. (R., p.3-4.) In that petition, Mr. Peterson continued to claim that his due process and

civil rights had been violated by the district court's failure to maintain an adequate record. (R., pp.4, 9.) For example, Mr. Peterson alleged that the exhibits introduced at the preliminary hearing in the third case had been misplaced, which made it impossible to include them in the appellate record, and therefore, deprived him of his constitutional right to due process. (R., p.8.) In addition, he contended that trial counsel provided ineffective assistance for failing to file a motion, as requested by Mr. Peterson, "to receive court transcripts from the preliminary hearing." (R., pp.4-5.) Mr. Peterson also moved for the district court to appoint him counsel on the successive petition. (R., pp.17-18.)

The district court denied the request for counsel and filed a notice of intent to dismiss the petition. (R., pp.22-26.) The district court gave the following reasons for its decisions: (1) the due process and civil rights claims were barred by *res judicata* because they were raised in the direct appeal<sup>2</sup>; (2) Mr. Peterson had provided only a bare, conclusory allegation in regard to counsel's failure to request the transcript of the preliminary hearing; and (3) the assertion that counsel failed to request the transcript does not indicate that counsel failed to investigate some point relevant to the defense. (R., p.24.) However, the district court provided an exemplar response that Mr. Peterson might use to clarify his allegations so that they would present a viable claim of ineffective assistance of counsel. (R., p.25.) It also informed Mr. Peterson, "[a]dditional information that would be helpful to the Court in determining whether to appoint counsel on this claim, but which is not required includes: 1) what is Mr. Peterson's

---

<sup>2</sup> Mr. Peterson is not challenging the decision to dismiss the due process and civil rights claims, insofar as, could and should they have been raised in the direct appeal, they were.



understanding concerning the reason his attorney declined to ask the Court for the transcript; and 2) was the attorney in question present at the preliminary hearing?" (R., p.25 (emphasis from original.) The district court concluded that, "[u]pon timely receipt of this supplemental affidavit, the Court will reconsider the issue of appointing counsel and whether the petition should be dismissed." (R., pp.25-26.)

Following the form provided by the district court, Mr. Peterson filed a supplemental affidavit. (R., pp.32-33.) In that affidavit, he alleged that "this transcript [of the preliminary hearing in the third case] was to provide the courts with factual evidence that [the alleged victim] not only initiated contact but manipulated and bribed me to continue contact even though there was a no contact order." (R., p.32.) He also alleged that "[t]he transcripts will show prosecution submitted 'phone records' and 'text message records' as exhibit 'A' of evidence," and that "seeing those transcripts would [ha]ve persuaded me to request to see the evidence before I accepted a plea offer." (R., pp.32-33.) He continued, alleging that, upon making the request for the transcript of that preliminary hearing, "it would have been found that the evidence did not exist, further knowing there was no such phone records or text messages I would have taken CR-FE-2011-0003748 to trial." (R., p.33.) As a result, he alleged that would not have pled guilty in the third case, and therefore, would not have been found in violation of his probation in the second case (which is the criminal case underlying this successive petition for post conviction relief). (R., pp.32-33.) He also answered one of the district court's other questions, alleging that trial counsel was not at the preliminary hearing in question, and "that is another reason I requested that he ask for the transcripts." (R., p.33.)

However, in the interim between the filing of the district court's notice of intent to dismiss and Mr. Peterson's supplemental affidavit, the State filed an answer to his petition. Besides denying all of Mr. Peterson's relevant allegations, the State's answer asserted that Mr. Peterson's allegations should be barred because they needed to be, but were not, raised in his initial petition for post conviction relief. (R., p.29.) The State did not file any other documents, such as a motion for summary dismissal. (See *generally* R.)

Ultimately, the district court recognized Mr. Peterson's timely response to the notice of intent to dismiss, but dismissed his claim of ineffective assistance because he had failed to raise it in his initial petition. (R., pp.39-40.) It also determined, as an alternative basis for summary dismissal, the facts alleged by Mr. Peterson in his supplemental petition would not have established a defense, merely mitigation at sentencing, and that the information was, in fact, argued as mitigation at sentencing. (R., p.40.) Furthermore, it found that Mr. Peterson's conclusion – that the exhibit in question would have been found to be misplaced – was not persuasive on the issue of whether counsel's performance was deficient, since no one knew that Exhibit A was missing until the direct appeal was underway. (R., p.41.) As such, it decided that counsel's performance, based on the information known at the time, was reasonable. (R., p.41.) Therefore, the district court determined that Mr. Peterson had failed to state a genuine issue of material fact. (R., pp.40-41.) The district court did not reconsider whether Mr. Peterson had stated a potential issue meriting the appointment of post conviction counsel. (See *generally* R., pp.35-42.)

As a result of those conclusions, the district court entered a judgment summarily dismissing Mr. Peterson's petition. (R., p.44.) Mr. Peterson filed a timely notice of appeal from that judgment. (R., pp.46-48.)

## ISSUES

1. Whether the district court erroneously summarily dismissed Mr. Peterson's successive petition without providing him notice of the reason for dismissal and providing him a meaningful opportunity to respond thereto.
2. Whether the district court erred by summarily dismissing Mr. Peterson's petition without first resolving the question of whether counsel should be appointed and when his allegations established the possibility of a valid claim.

## ARGUMENT

### I.

#### The District Court Erroneously Summarily Dismissed Mr. Peterson's Successive Petition Without Providing Him Notice Of The Reason For Dismissal And Providing Him A Meaningful Opportunity To Respond Thereto

Post-conviction cases are civil in nature. *Baldwin v. State*, 145 Idaho 148, 153 (2008). The petitioner in such cases must make more than a short and plain statement of the claim; he must support his petition by a statement that “specifically set[s] forth the grounds upon which the application is based.” *Ridgley v. State*, 148 Idaho 671, 674-75 (2010) (quoting *Rhoades v. State*, 148 Idaho 247, 249-51 (2009)). The petition also needs to be accompanied by admissible evidence in support of the allegations. *Id.* To that point, if the petition is verified, it functions as an affidavit, and so, presents evidence in support of the allegations. *Loveland v. State*, 141 Idaho 933, 936 (Ct. App. 2005); *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993).

The district court may summarily dismiss a petition if it “is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings.” I.C. § 19-4906(b). However, before the district court may summarily dismiss the proceedings, particularly if the petition was filed *pro se* and includes a request for appointment of counsel, “[i]t is essential that the petitioner be given adequate notice of the claimed defects so he has an opportunity to respond and to give the trial court an adequate basis for deciding the need for counsel based upon the merits of the claims.” *DeRushe v. State*, 146 Idaho 599, 601 (2009) (quoting *Brown v. State*, 135 Idaho 676, 679 (2001), *superseded by statute on other grounds*). “Failure to provide such notice

and opportunity to be heard may result in the reversal of a summary dismissal of a petition for post conviction relief.” *Ridgley*, 148 Idaho at 676. Furthermore, “[w]hen the right [to have claims resolved on their merits] is affected by a defective notice of proposed dismissal, this Court cannot disregard the error.” *Griffin v. State*, 142 Idaho 438, 442 (Ct. App. 2006) (quoting *Baker v. State*, 142 Idaho 411, 421 (Ct. App. 2005)).

The reason the district court gave for its decision to summarily dismiss Mr. Peterson’s petition was that the claim of ineffective assistance of counsel was procedurally defaulted, as it had not been raised in his initial petition for relief. (R., pp.39-40.) The district court recognized that it did not mention that as a justification in its notice of intent to dismiss. (R., p.39; see *generally* R., pp.22-26.) In fact, the only place that justification had been mentioned was in the State’s answer to the petition. (R., p.29; see *generally* R.) However, the Idaho Supreme Court has held that making such a claim in the answer to a petition for post conviction relief does not satisfy the notice requirement. See *Saykhamchone v. State*, 127 Idaho 319, 322 (1995). Specifically, the Supreme Court held that, “when the state files an answer, as it did here, the petitioner can rightly expect the matter will go to an evidentiary hearing on the issues framed by the pleadings, unless the district court provides a twenty-day notice of intent to dismiss, or the state files a motion for summary disposition.” *Id.* The Court continued: “Under the circumstances, we do not believe the state’s general request in the Answer’s prayer for relief can fairly constitute a ‘motion.’” *Id.*

In its answer in that case, the State “denied Saykhamchone’s allegations of ineffective assistance of counsel, and raised various affirmative defenses.” See *id.* at 321. That answer concluded by requesting that the district court “[d]ismiss the Petition

for Post-Conviction Relief in the above entitled action without further hearing and pursuant to Idaho Code, §§ 19-4901, *et seq.*” *Id.* “The State filed no pleadings other than its Answer, and never filed or presented orally a motion for summary disposition of the application.” *Id.* The State’s actions in this case are very similar to the ones it took in *Saykhamchone*. The State denied Mr. Peterson’s allegations of ineffective assistance of counsel and raised various affirmative defenses. (R., pp.27-29.) It concluded by requesting that “The Petitioner’s claims for post-conviction relief be denied . . . [or] dismissed.” (R., p.30.) It did not file any other pleadings, nor did it file or present any motions for summary disposition. (*See generally* R.) In such cases, “the state’s prayer for relief in the Answer was deficient [to provide notice] for not stating its grounds *with particularity*, and for not stating that it was the state’s *motion* for summary disposition under I.C. § 19-4906(c).” *Saykhamachone*, 127 Idaho at 322 (emphasis from original).

As a result, because the justification for summary dismissal – that the claims were procedurally defaulted for not being raised in the initial petition – was not included in the notice of intent to dismiss the petition, and because the claim in the State’s answer was insufficient, Mr. Peterson did not receive the requisite notice and opportunity to respond to that justification.<sup>3</sup> Therefore, the judgment should be vacated

---

<sup>3</sup> It is possible that Mr. Peterson could, given the meaningful opportunity (particularly if he were afforded the assistance of counsel), justify why these claims were not presented in his initial petition. After all, the post conviction statute expressly allows for claims not raised in an initial petition to be presented in a successive petition, provided the petitioner can show “sufficient reason [such claim] was not asserted or was inadequately raised in the original, supplemental, or amended application.” I.C. § 19-4908.

and this case remanded so that Mr. Peterson is afforded the requisite notice and opportunity to respond.

## II.

### The District Court Erred By Summarily Dismissing Mr. Peterson's Petition Without First Resolving The Question Of Whether Counsel Should Be Appointed And When His Allegations Established the Possibility Of A Valid Claim

Even where the appellate courts have found a lack of proper notice, they have, at times, looked to the merits of the petition to determine if the dismissal was nevertheless appropriate. See *Ridgley*, 148 Idaho at 676-77; *Baxter v. State*, 149 Idaho 859, 865 (Ct. App. 2010); *but see Saykhamchone*, 127 Idaho at 328 (“[B]ecause Saykhachone was not given proper notice, we also reverse the district court’s ruling that Saykhamchone’s application raised no genuine issue of material fact. . . . [I]f Saykhamchone had been given [the requisite notice], Saykhamchone might have been able to respond in a way that would raise a genuine issue of material fact.”) However, even if notice had been provided in this case, summary dismissal was still not appropriate because Mr. Peterson had renewed his request for appointment of counsel (R., p.33) and the district court did not address that motion before deciding the substantive question of whether summary dismissal was appropriate.<sup>4</sup> (See generally R., pp.35-42.) By not resolving the motion for counsel before summarily dismissing the

---

<sup>4</sup> This is particularly concerning in this case, since the district court told Mr. Peterson that, “[u]pon timely receipt of this supplemental affidavit, the Court will reconsider the issue of appointing counsel.” (R., pp.25-26.) The district court did not make good on that promise despite the fact that Mr. Peterson timely filed a supplemental affidavit, which conformed to the district court’s stated suggestions for clarification. Furthermore, the fact that the district court told Mr. Peterson how to respond is indicative of the fact that Mr. Peterson had raised the *possibility* of a valid claim, if he presented it in the form the district court provided.



petition, the district court abused its discretion. *Charboneau v. State*, 140 Idaho 789, 793 (2004).

Additionally, assuming that Mr. Peterson is able to make an argument for tolling the time to file this claim, summary dismissal was also inappropriate in this case because Mr. Peterson's allegations established the possibility of a valid claim, if not a genuine issue of material fact, that his attorney provided ineffective assistance of counsel. Therefore, he should have, at least, been appointed counsel in this post conviction case.

The standard a *pro se* petitioner must meet to justify appointment of counsel is not as high as the standard for surviving summary dismissal. To merit appointment of counsel, a petitioner must simply allege facts that raise the possibility of a valid claim. *Id.* *Pro se* petitioners are held to this low standard because the Idaho Supreme Court has recognized that "petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the *pro se* petitioner simply does not know what are the essential elements of a claim." *Id.* at 792 (quoting *Brown*, 135 Idaho at 679). Therefore, the purpose of appointing post conviction counsel is to assist the *pro se* petitioner who has a valid claim, but who may struggle in presenting all the necessary components of that claim, in arguing a genuine issue of material fact, and so, survive summary dismissal of a legitimate claim for relief. *See id.* After all, it is preferable for claims to be resolved "on the merits rather than on technicalities." *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 871 (1999).

In determining whether the petitioner has met this burden, “every inference must run in the petitioner’s favor where the petitioner is unrepresented at the time and cannot be expected to know how to properly allege the necessary facts.” *Charboneau*, 140 Idaho at 794. Only if, after running all the inferences in the petitioner’s favor, the pleadings still fail to set forth the possibility of a non-frivolous issue, may the district court deny the request for counsel. *Judd v. State*, 148 Idaho 22, 24 (Ct. App. 2009).

To allege facts to make out the possibility of a valid claim of ineffective assistance of counsel, the petitioner must allege facts which demonstrate that counsel’s performance fell below a reasonable standard and that the petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKeeth v. State*, 140 Idaho 847, 850 (2004). In regard to the second prong of the *Strickland* test, a petitioner shows prejudice when he demonstrates that there is a reasonable probability that the outcome would have been different, or, in other words, he must undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *McKay v. State*, 148 Idaho 567, 570 (2010). In cases where, as here, the petitioner alleges ineffective assistance relating to his decision to enter a guilty plea, he must show “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Booth v. State*, 151 Idaho 612, 621 (2011) (quoting *Ridgley*, 148 Idaho at 676 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985))).

In this case, Mr. Peterson alleged facts which raised not only the possibility of a valid claim. An attorney provides objectively unreasonable performance if it is shown that counsel failed to conduct a reasonable, prompt, and thorough investigation.

*Mitchell v. State*, 132 Idaho 274, 280 (1998). That is particularly true if the petitioner can show that the “known evidence would lead a reasonable attorney to investigate further.” *Murphy v. State*, 143 Idaho 139, 146 (Ct. App. 2006). Mr. Peterson alleged that he requested trial counsel ask for the transcript of the preliminary hearing from the related case. (R., p.5.) He alleged that investigation of the preliminary hearing transcripts would “show prosecution submitted ‘phone records’ and ‘text message records’ as exhibit ‘A’ of evidence,” and that, “seeing those transcripts would [ha]ve persuaded me to request to see the evidence . . . .” (R., pp.32-33.) He also alleged that, upon making that investigation, “it would have been found that the evidence did not exist.” (R., p.33.)

Since the State has the burden of proof in criminal cases, a reasonable attorney would definitely investigate further upon finding that the evidence purportedly supporting the only charge in the complaint was missing and potentially nonexistent. The implication of lost or missing evidence is that the State would be unable to prove Mr. Peterson guilty at trial, and thus, he would have won an acquittal in the third case. (See R., pp.31-33.) By the same token, the State would be unable to prove the probation violation in this case, and therefore, his probation in this case would not have been revoked. Thus, the uncontradicted facts establish that trial counsel did not investigate that evidence, and so, establish that trial counsel’s performance was objectively unreasonable. Therefore, drawing the inferences in Mr. Peterson’s favor, his allegations establish *the possibility* of a valid claim that his attorney had provided ineffective assistance.

Mr. Peterson also alleged the possibility of prejudice arising from that deficient performance, as he asserted that “seeing those transcripts would [ha]ve persuaded me to request to see the evidence before I accepted a plea offer,” and that “knowing there was no such phone records or text messages I would have taken CR-FE-2011-0003748 to trial.” (R., pp.33.) As a result, he alleged that would not have entered the guilty plea which was the basis for the revocation of probation in this case. (R., pp.32-33.) That allegation certainly undermines confidence that Mr. Peterson would have pled guilty when he did, and so, raises the possibility of prejudice arising from the deficient performance.

In light of Mr. Peterson’s allegations, the district court’s alternative reason for summarily dismissing the petition – that, based on the information available at the time Mr. Peterson pled guilty, which did not include the fact that Exhibit A was not maintained as part of the record since that fact was not discovered until the direct appeal was underway, counsel’s performance was reasonable (R., p.41) – does not justify the decision to not appoint post conviction counsel. The claim Mr. Peterson raised was that counsel was ineffective *for not looking for that additional, relevant information* before advising Mr. Peterson to plead guilty. Therefore, regardless of what facts were known at the time, there is a possibility that counsel’s performance was still deficient because he did not fulfill his duty to investigate the case.

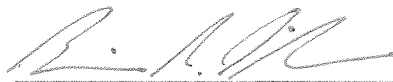
Therefore, Mr. Peterson alleged the possibility of a valid claim, and should have been appointed counsel to represent him on his successive petition. As such, this Court should remand the case for appointment of counsel to assist Mr. Peterson in taking

advantage of a meaningful opportunity to respond to the proposed justifications for summary dismissal.

CONCLUSION

Mr. Peterson respectfully requests that this Court vacate the judgment summarily dismissing his successive petition for post conviction relief, and remand this case for further proceedings following appointment of counsel.

DATED this 15<sup>th</sup> day of October, 2014.

A handwritten signature in black ink, appearing to read 'B. R. Dickson', is written over a horizontal line.

BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15<sup>th</sup> day of October, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

THOMAS EDWARD PETERSON  
INMATE #68476  
SICI  
PO BOX 8509  
BOISE ID 83707

MICHAEL E WETHERELL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010  
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH  
Administrative Assistant

BRD/eas